IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 2, 2003 Session

FREEMAN INDUSTRIES LLC v. EASTMAN CHEMICAL COMPANY, ET AL.

Interlocutory Appeal by Permission from the Law Court for Sullivan County
No. C34355-L Richard E. Ladd, Chancellor

FILED MAY 18, 2004

No. E2003-00527-COA-R9-CV

In this antitrust case, Freeman Industries LLC ("Freeman") sued Eastman Chemical Company ("Eastman") and others for damages, alleging that the defendants engaged in the illegal price-fixing of sorbates, a generic label for several food preservatives. Freeman, who purchased products containing sorbates from entities in New York State, brought suit under the Tennessee Trade Practices Act ("the TTPA") and pursuant to a theory of unjust enrichment. In addition, Freeman sought class certification for all other individuals and entities similarly situated in thirty-five states, including New York, but, significantly, not including the state of Tennessee. Following a hearing on the defendants' motion to dismiss, the trial court granted the motion with respect to the TTPA claim, holding that the TTPA does not apply to indirect purchasers or out-of-state transactions. At a subsequent hearing, the trial court denied Freeman's motion for class certification; and also denied the defendants' motion for summary judgment on Freeman's unjust enrichment claim. Both sides appeal. Because we find that the trial court reached a conclusion that is contrary to the decision of this court in the case of ***Sherwood v. Microsoft Corp***., No. M2000-01850-COA-R9-CV, 2003 WL 21780975 (Tenn. Ct. App. M.S., filed July 31, 2003) (Tenn. R. App. P. 11 application pending) – which decision was released after the trial court rendered its decision – we modify the trial court's judgment by deleting that portion of the court's decision holding the TTPA does not apply to indirect purchasers. In all other respects, we affirm the trial court's judgment.

Tenn. R. App. P. 9 Interlocutory Appeal by Permission; Judgment of the Law Court Affirmed, as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., E.S., and GARY R. WADE, SP. J., joined.

John S. Bingham, Kingsport, Tennessee, for the appellant, Freeman Industries LLC.

William T. Gamble, Kingsport, Tennessee, and Thomas Demitrack, Cleveland, Ohio, for the appellee, Eastman Chemical Company.

S. Morris Hadden, Kingsport, Tennessee, for the appellees, Hoechst Aktiengesellschaft; Nutrinova Nutrition Specialties & Food Ingredients, GmbH; Daicel Chemical Industries, Ltd.; and Nippon Gohsei Industries, Ltd (Michael D. Blechman and Jennifer B. Patterson, New York, New York, of counsel for the appellees, Hoechst Aktiengesellschaft and Nutrinova Nutrition Specialties & Food Ingredients, GmbH; Herbert S. Washer and Jennifer Wendy, New York, New York, of counsel for the appellee, Daicel Chemical Industries, Ltd.; Eugene Illovsky and Peter Stern, Walnut Creek, California, of counsel for the appellee, Nippon Gohsei Industries, Ltd.).

OPINION

I.

Freeman is a New York corporation, whose principal place of business is in Tuckahoe, New York. It is an end-user of food products such as cheese, bagels, and baked goods that contain minute amounts of food preservatives generically known as sorbates. Freeman purchases its food products at supermarkets in New York State.

In its business, Freeman produces and sells products such as vitamin A and D concentrates to, among others, food processors. In connection with its business, Freeman makes direct purchases of sorbates. However, Freeman does not premise its right of recovery in the instant case on such direct purchases; rather it relies upon its indirect purchases from supermarkets in its role as an end-user.

Eastman is a Delaware corporation with its principal place of business in Kingsport. The other defendants are two German corporations and two Japanese corporations. All of the defendants are producers of sorbates. They sell sorbates to distributors or directly to food manufacturers.

Between 1998 and 2001, all of the defendants pled guilty to fixing the price of sorbates, in violation of Section 1 of the Sherman Antitrust Act.[1] Subsequent to the entry of their guilty pleas, the defendants settled with a nationwide class of direct purchasers under federal law. In addition, the defendants settled lawsuits filed by indirect purchasers in fourteen states, *including Tennessee*, and the District of Columbia.[2]

[1] 15 U.S.C. § 1 (1997).

[2] The fourteen states are as follows: Arizona, California, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, North Dakota, South Dakota, *Tennessee*, West Virginia, and Wisconsin.

On January 31, 2002, Freeman filed this class action lawsuit on behalf of itself and all similarily-situated individuals and entities in thirty-five other states,[3] who, after January 1, 1979, purchased products containing sorbates from entities other than the defendants. Such purchasers are referred to as "indirect purchasers" because they do not purchase sorbates directly from the defendants, but rather purchase products containing sorbates from others who are lower down in the distribution chain. Freeman premised its lawsuit on dual theories: (1) that the defendants violated the TTPA, codified at Tenn. Code Ann. § 47-25-101, *et seq.*, by selling sorbates from Tennessee into the states where Freeman and the putative class members make or made their purchases from others; and (2) that the defendants were unjustly enriched by virtue of the fact that Freeman and the putative class members are or were forced to pay inflated prices for sorbates.

The defendants filed a motion to dismiss Freeman's complaint. Following a hearing, the trial court granted the defendant's motion with respect to the TTPA, concluding that the act does not apply to transactions outside of Tennessee and does not apply to indirect purchasers.

The trial court then held a second hearing, this time with respect to Freeman's motion for class certification and the defendants' motion for summary judgment on Freeman's unjust enrichment claim. The trial court refused to certify the class, holding that Freeman could not satisfy some of the requisite elements under Tenn. R. Civ. P. 23. The court also determined that the defendants were not entitled to summary judgment on Freeman's unjust enrichment claim. This appeal followed.

II.

The TTPA provides, in pertinent part, as follows:

Tenn. Code Ann. § 47-25-101 (2001)

> All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported *into this state*, or in the manufacture or sale of articles of *domestic* growth or of *domestic* raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

[3]The states involved are Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

Tenn. Code Ann. § 47-25-102 (2001)

> Any arrangements, contracts, and agreements that may be made by any corporation or person, or by and between its agents and subagents, to sell and market its products and articles, manufactured *in this state*, or imported *into this state*, to any producer or consumer at prices reduced below the cost of production or importation *into this state*, including the cost of marketing, and a reasonable and just marginal profit, to cover wages or management, and necessary incidentals, as is observed in the usual course of general business, and the continuance of such practice under such contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or any other arrangements, contracts, or agreements, by and between its agents and subagents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported *into the state*, and which amount to a subterfuge for the purpose of obtaining the same advantage and purposes are declared to be against public policy, unlawful, and void.

Tenn. Code Ann. § 47-25-106 (2001)

> Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

(Emphasis added).

III.

A.

Both parties raise issues on appeal. Freeman argues that the trial court erred in dismissing its TTPA claim because, according to Freeman, the TTPA applies to indirect purchasers who are out-of-state residents or entities. Further, Freeman contends that the trial court abused its discretion in denying the motion for class certification with respect to Freeman's claim of unjust enrichment. On the other hand, the defendants argue that the trial court erred in refusing to grant them summary judgment on Freeman's unjust enrichment claim. We will address these issues in turn.

B.

As previously stated, the trial court granted the defendants' motion to dismiss Freeman's TTPA claim. The defendants' motion was premised on the failure of the complaint to state a claim upon which relief can be granted. *See* Tenn. R. Civ. P. 12.02(6). "Such a motion challenges the legal sufficiency of the complaint." ***Trau-Med of Am., Inc. v. Allstate Ins. Co.***, 71 S.W.3d 691, 696 (Tenn. 2002). Our role on this appeal is clear. We "must construe the complaint liberally, presum[e] all factual allegations to be true and giv[e] the plaintiff the benefit of all reasonable inferences." ***Id.*** A complaint should be dismissed only if "it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief." ***Cook v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934, 938 (Tenn. 1994). Our review is *de novo* with no presumption of correctness attaching to the trial court's judgment, ***Trau-Med***, 71 S.W.3d at 696-97, because the question before us is one of law.

Freeman and the members of the putative class, by the limiting language of the complaint, are out-of-state residents and entities who purchased products containing sorbates in states other than Tennessee; in other words, Freeman and the others purchased products that contained sorbates from retailers or wholesalers, rather than purchasing sorbates directly from the defendants who originally produced the food preservatives. The sole connection of Freeman's claim to the state of Tennessee is the allegation that Eastman – who admittedly engaged in illegal conduct proscribed by the TTPA – engaged in that conduct in, and shipped sorbates from, Tennessee, into the states in which Freeman and the putative class members reside and where they engaged in the transactions about which they complain. Nevertheless, Freeman contends that the TTPA authorizes a recovery for indirect purchasers, such as itself and the members of the putative class, when the transactions occurred out-of-state, provided the defendants' misconduct "substantially affects" Tennessee commerce. Freeman asserts that the "[d]efendants' price-fixing agreements were hatched in Tennessee" and that these agreements "substantially affected commerce [in Tennessee] because all sorbates sold inside and outside Tennessee were tainted" by the illegal agreements. In advancing this position, Freeman relies primarily upon the recent opinion of this court in the case of ***Sherwood v. Microsoft Corp.***, No. M2000–01850-COA-R9-CV, 2003 WL 21780975 (Tenn. Ct. App. M.S., filed July 31, 2003) (Tenn. R. App. P. 11 application pending). We agree that the ***Sherwood*** opinion is dispositive with respect to the TTPA claim asserted in Freeman's complaint. Because we find the ***Sherwood*** opinion, authored by Judge Patricia J. Cottrell, to be an excellent and exhaustive study of the evolution of antitrust law in this state and a correct interpretation of the TTPA, we will rely on ***Sherwood*** extensively in this opinion.

The plaintiffs in ***Sherwood*** were a class of *Tennessee* consumers who purchased – *in Tennessee* – Microsoft software. ***Id.*** at *1. The plaintiffs alleged that Microsoft had violated the TTPA by "engag[ing] in conduct that eliminated or retarded the development of new software products that could support or become alternative platforms to Microsoft's operating systems" and that the price of the software "was higher than it would have been in a competitive market." ***Id.*** The trial court found that the plaintiffs, indirect purchasers, had a cause of action under the TTPA. ***Id.*** at *2.

Before addressing whether the TTPA applies to indirect purchasers, Judge Cottrell examined the evolution of both federal and state antitrust law:

> Section 1 of the Sherman Act makes contracts, combinations, and conspiracies "in restraint of trade or commerce among the several [S]tates" illegal. 15 U.S.C. § 1. Similarly, Section 2 of the Act prohibits monopolies and conspiracies to monopolize "any part of the trade or commerce among the several States." 15 U.S.C. § 2. Consequently, there is an interstate commerce jurisdictional requirement under the Act. ***Summit Health, Ltd. v. Pinhas***, 500 U.S. 322, 11 S. Ct. 1842, [114 L. Ed. 2d 366] (1991).
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> Just as actions under federal antitrust statutes can proceed only if there is a jurisdictional basis in interstate commerce, a plaintiff seeking relief under state antitrust statutes must show that those statutes apply, whether such a showing is required to establish subject matter jurisdiction or simply to state a claim.
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> As a general rule, federal antitrust law does not preempt state antitrust law. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." ***Cal. v. ARC Am. Corp.***, 490 U.S. 93, 101-102, 109 S. Ct. 1661, 1666, 104 L. Ed. 2d 86 (1989).
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> The interstate versus intrastate commerce issue is only raised as a defense where it is arguable that a particular state has limited the scope of its antitrust statute by imposing a greater connection with or impact upon commerce within the state than is the general constitutionally required standard. Apparently, only a few states fall in that category; *Tennessee is one*.
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> Thus, it is not federal law that determines whether Tennessee has jurisdiction under the TTPA. . . . Rather, it is state law that

> determines what degree of connection with or impact upon commerce within the state must exist.

Sherwood, 2003 WL 21780975, at *5-*9 (emphasis added).

The court then discussed the few Tennessee cases that have addressed the reach of the TTPA, beginning with ***Standard Oil Co. v. State***, 117 Tenn. 618, 100 S.W. 705 (1907). The defendants in ***Standard Oil*** were found guilty of conspiring to lessen the competition of coal oil sales in Tennessee, in violation of the TTPA.[4] ***Id.*** at 706. The defendants appealed, arguing that the antitrust statute was an unconstitutional attempt to regulate interstate commerce. ***Id.*** at 709. Specifically, the defendants contended that the statute's application to transactions involving "the importation of articles of commerce from other states" into Tennessee was a regulation of interstate commerce, which violated the United States Constitution. *See* U.S. Const. art. I, § 8. The Supreme Court disagreed, finding that the TTPA, "when properly construed, does not apply to interstate commerce." ***Standard Oil***, 100 S.W. at 709. The Court went on to identify the sole purpose of the TTPA as "correct[ing] and prohibit[ing] abuses of trade *within the state*." ***Id.*** (emphasis added).

> The wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce *within the state*, which Congress could not reach, and for which there was then no efficient remedy.

Id. at 710 (emphasis added).

The Court of Appeals first addressed the present-day version of the TTPA in ***Lynch Display Corp. v. Nat'l Souvenir Ctr., Inc.***, 640 S.W.2d 837 (Tenn. Ct. App. 1982). Lynch was a Maryland corporation that agreed to lease wax figures to HRI, a Tennessee corporation that was operating a wax museum. ***Id.*** at 839. The lease contained a requirement that HRI enter into a franchising agreement with a District of Columbia corporation, NHM. ***Id.*** HRI subsequently stopped making payments to NHM under the franchise agreement. ***Id***. HRI then filed suit in federal court for a violation of federal antitrust law. ***Id.*** Lynch filed suit in state court; HRI filed a counterclaim alleging that both the original lease agreement and the franchise agreement "were forced on HRI because of the monopoly position of Lynch," resulting in void agreements under the Tennessee antitrust statute. ***Id.*** This court, in agreeing with the trial court, found that the transactions of the parties exclusively involved interstate commerce, which did not trigger the state antitrust act. ***Id.*** at 839, 840. We opined that "[t]he Tennessee antitrust law applies to transactions which are *predominantly* intrastate in character." ***Id.*** at 840 (emphasis in original).

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[4] While the statute as it existed in 1907 was not known as the TTPA, the essential language of the statute has not changed since that time. Therefore, for ease of reference while discussing ***Standard Oil***, we will refer to the statute as the TTPA.

More recently, we addressed the TTPA in ***Blake v. Abbott Labs., Inc.***, No.03A01-9509-CV-00307, 1996 WL 134947 (Tenn. Ct. App. E.S., filed March 27, 1996). The plaintiffs in ***Blake*** were Tennessee consumers who purchased infant formula in Tennessee. ***Id.*** at *1. They sued the defendant, an out-of-state company, for "grossly overcharging" the plaintiffs for the formula. ***Id.*** This court, in reaffirming the "predominantly intrastate" test set forth in ***Lynch***, determined that there were insufficient facts to make a determination as to whether the transactions involved in the case predominantly affected interstate commerce rather than intrastate commerce. ***Id.*** at *5. Consequently, the court held that the case should not have dismissed under Tenn. R. Civ. P. 12. ***Id.***

After further analyzing the TTPA as interpreted by courts in other states, the ***Sherwood*** court held as follows:

> We conclude that Tennessee's antitrust statute is not limited to anticompetitive conduct occurring within the boundaries of the state. We also conclude that it is not limited to transactions between the parties that are predominantly intrastate in character. We also conclude that neither a transaction-based nor a locality-of-illegal-conduct based test is appropriate for determining the scope of the TTPA. Instead, the proper test must relate to the potential effect or impact on commerce *within this state* of the illegal acts condemned by the statute because such a standard is directly related to the purpose of the Act.

Id. at *17 (emphasis added). The court went on to reject the "predominantly intrastate" test, holding that "we simply cannot conclude that the legislature intended to limit the application of the statute geographically *other than the effect on competition and prices in Tennessee*." ***Id.*** at *20 (emphasis added). Instead, the court determined that the TTPA applies "to illegal conduct that substantially affects commerce *within this state*." ***Id.*** at *21. The court then concluded that the plaintiffs had "sufficiently alleged substantial effects on commerce within this state" in order to sustain a claim under the TTPA. ***Id.*** at *22. After making the determination that the plaintiffs had passed the "substantial effects" test, the court proceeded to hold that "indirect purchasers are 'persons' who may bring an action for an injury caused by [a] violation of the TTPA." ***Id.*** at *29.

In the instant case, Freeman argues that it and the putative class members, as indirect purchasers of sorbates, have standing to bring suit against the defendants under the TTPA based upon the holding in ***Sherwood***. While we agree with Freeman that ***Sherwood*** is authority for the proposition that *indirect* purchasers may recover under the TTPA, ***Sherwood*** does not extend the purview of the TTPA to cover those indirect purchasers who are not Tennessee consumers, *i.e.*, those consumers who did not consume or purchase their products in transactions within the state of Tennessee. Freeman and the putative class members are all residents of other states, and all of their purchases of products containing sorbates occurred outside of Tennessee. There is simply no caselaw, nor is there an interpretation of the TTPA, that would allow this statutory scheme to be relied upon in such a situation.

Throughout the ***Sherwood*** opinion, there are repeated references to the effects on commerce within the state. The court specifically held that the TTPA applies to "anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers *in Tennessee*," ***id.*** at *16 (emphasis added), and concluded that the Tennessee legislature did not intend to "limit the application of the statute geographically *other than the effect on competition and prices in Tennessee*." ***Id.*** at *20 (emphasis added). The plaintiffs in ***Sherwood*** were Tennessee consumers who purchased Microsoft software in Tennessee. ***Id.*** at *1. Even though Microsoft was a corporation that clearly engaged in significant interstate commerce, the fact that its software was sold in Tennessee supported a finding that Microsoft's anticompetitive conduct "substantially affected" Tennessee commerce, *i.e.*, transactions in Tennessee involving the ***Sherwood*** plaintiffs. ***Id.*** at *22.

In the instant case, the indirect purchase of sorbates by out-of-state residents in states other than Tennessee cannot be characterized as *Tennessee* commerce that has been substantially affected by the anticompetitive conduct alleged in this case. The TTPA simply was not designed to protect such out-of-state transactions involving non-Tennessee based consumers. As the Tennessee Supreme Court stated in ***Standard Oil***, "the sole object and purpose of the enactment of [the TTPA] was to correct and prohibit abuses of trade *within the state*." ***Id.*** at 709 (emphasis added).

Freeman strenuously argues that the defendants' illegal conduct occurred in Tennessee and that this conduct – in Freeman's words – "substantially affected commerce [in Tennessee] because all sorbates sold inside and outside Tennessee were tainted." It contends that their "substantially affected commerce" allegation is sufficient to place their complaint within the ambit of the TTPA and therefore sufficient to avoid dismissal at this juncture in the proceedings. It is true that "substantially affected commerce" within this state gives rise to a claim *for an appropriate plaintiff* under the TTPA; but *all* of the claims which could have been pursued based on *such* transactions – be they associated with direct or indirect purchasers – *have been settled in earlier litigation*. Freeman's complaint expressly refers to transactions that occurred outside the state of Tennessee. It does not seek to claim *any* transactions in Tennessee and the class sought to be certified is expressly limited to indirect purchasers whose transactions were outside this state. Freeman cannot rely upon the transactions of others, all of whose claims have been settled. As we clearly indicated in ***Sherwood***, a claimant cannot rely upon the claims of other unidentified individuals and entities to establish subject matter jurisdiction for itself under the TTPA. *See* ***Sherwood***, 2003 WL 21780975, at *4 ("Plaintiffs argue that since Microsoft has stated that virtually all its sales are through middlemen, there is some possibility that there may have been some direct sales to some unknown Tennesseans. *However, Plaintiffs have made no such claim themselves. The named plaintiffs cannot rely on unidentified persons who may have suffered an injury to state a claim for relief.*") As applied to the facts of the instant case, Freeman cannot rely upon the activity of individuals or entities who were involved in "substantially affected commerce" in Tennessee to obtain subject matter jurisdiction under the TTPA for itself and the members of the putative class when neither Freeman nor any of the putative class members were themselves involved in Tennessee commerce. The issue is *not* whether someone at some time had a transaction *in Tennessee* that was substantially affected by the defendants' illegal conduct; rather, the issue is whether Freeman and the putative class members had such transactions. The answer is clearly no. Simply stated, the

allegations of the complaint, construed liberally in favor of Freeman and the putative class, demonstrate a lack of subject matter jurisdiction under the TTPA.

Because ***Sherwood*** – which we would note was decided more than a year after the trial court made its decision in this case – holds that the TTPA *does* apply to indirect purchasers, we modify the trial court's decision holding to the contrary. However, because Freeman cannot show that its purchases of sorbates were in "substantially affected" Tennessee commerce, the trial court's ruling that the TTPA does not apply to Freeman's claim is affirmed.

C.

Freeman next contends that the trial court abused its discretion in refusing to grant Freeman's motion for class certification on the unjust enrichment claim. The decision whether to grant or deny a motion for class certification rests within the sound discretion of the trial court. *See* ***Warren v. Scott***, 845 S.W.2d 780, 782 (Tenn. Ct. App. 1992). Accordingly, we will not reverse a trial court's denial of class certification unless the party seeking certification has demonstrated an abuse of that discretion. *See* ***Hamilton v. Gibson County Util. Dist.***, 845 S.W.2d 218, 225 (Tenn. Ct. App. 1992).

The party seeking class certification has the burden of proving that the prerequisites set forth in Tenn. R. Civ. P. 23.01 have been satisfied. *See* ***Hamilton***, 845 S.W.2d at 224-25. Rule 23.01 provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

In addition, the party must comply with one of the three requirements found in Tenn. R. Civ. P. 23.02. In the instant case, Freeman relies on Rule 23.02(3), which states as follows:

> [T]he court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

> (d) the difficulties likely to be encountered in the management of a class action.

In ruling on Freeman's motion for class certification, the trial court found that Freeman had satisfied the Rule 23.01 requirements of numerous class members and Freeman's ability to fairly and adequately protect the interest of the class, but questioned whether Freeman had sufficiently proven the elements of common questions of law or fact and whether Freeman's claim is typical of the claims of the class, due to the possibility that the law of each of the 35 affected states would apply. However, the court unequivocally found that Freeman had not satisfied the requirements, under 23.02(3), of predominance and superiority. Specifically, the court stated the following:

> But since we're going under 23.02(3) then you have to also have a question of [law or] fact common to the members of the class predominate over any questions affecting only indirect members. Once again, I think you're going to get in a quagmire of law and of fact. Certainly, in the ***Meighan*** [***v. U.S. Sprint Communications Co.***] case the Tennessee Supreme Court approved the aggregate damage thing and counsel is absolutely correct on that. But what damage? As I said, you may go through five different consumers before you get the ultimate consumer. Who passed it on and who didn't? If it was not passed on then the ultimate consumer suffered no loss. And there must be proof of loss before the plaintiff can recover. Also, that the class action is superior to other methods. . . . Now it appears that the State of New York is suing and seven other states are suing. It appears to me that the individual state's Attorney Generals are the proper people to represent the people in their individual states and under their individual law rather than Tennessee where there are no Tennessee consumers involved in the class attempting to interpret the laws of the other states. Also, the interest of the members of the class [in] . . . individually control[ling the] prosecution or defense must be satisifed. You have the State of New York representing the people of New York and other states want to control it. On the class action, they would not. Under 23.02(3)(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. Although most of this litigation by the respective Attorneys General has not been filed, it appears they would. And I think it would be useless to continue on with a class action when that would not [sic] be met soon as these individual suits are filed. C, the desirability or undesirability of [concentrating] the litigation of the classes in this forum. As I said previously, Tennessee only has an interest because one of the defendants was involved in the price fixing. Otherwise, it's the other

> states that really have the interest and it seems, as I've stated, more appropriate that the Attorney Generals of those states proceed.
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> And, lastly, the difficulties likely to be encountered in the management of this class action. It's uncontrovertedly got around 200 million ultimate consumers. The difficulty to manage that in notice and resolving the damages, the plaintiffs say they want equity. How can I give equity under the aggregate damage when some states there may not – many of the people may not have suffered any damage?
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> Then, of course, you have to use the best practical notice. Now, what would be practical notice? It's pointed out by counsel the – we know who they are and there are methods of notifying them. I suppose it would be proper to consider that the cost of individual notice is not practical when you could go by publication. However, for all of these reasons I feel it's not an appropriate case to certify as a class action.

We find the trial court's approach to the class certification issue to be thorough and well-reasoned. The involvement of the attorneys general and the undesirability of concentrating the class litigation in Tennessee is enough to destroy predominance and superiority. Accordingly, we find no abuse of discretion in the court's decision to deny Freeman's motion for class certification.

D.

The defendants argue that the trial court erred in denying their motion for summary judgment on Freeman's unjust enrichment claim. Since summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993).

As the Tennessee Supreme Court has pointed out,

> [u]njust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist." ***Paschall's, Inc. v. Dozier***, 219 Tenn. 45, 407 S.W.2d 150, 154-55 (1966). Courts will impose a contractual obligation under an unjust enrichment theory when: (1) there is no contract between the parties or a contract has become unenforceable or invalid; and (2) the defendant will be unjustly enriched absent a quasi-contractual obligation. ***Id.*** []

Whitehaven Cmty. Baptist Church v. Holloway, 973 S.W.2d 592, 596 (Tenn. 1998). Before a party can recover under an unjust enrichment theory, the party seeking to recover must "have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services." ***Paschall's***, 407 S.W.2d at 155.

In denying the defendants' motion for summary judgment on the issue of unjust enrichment, the trial court found, with respect to Freeman's individual claim, that the choice of law issue, *i.e.*, whether Tennessee or New York law should apply, was a factual question under the teaching of ***Hataway v. McKinley***, 830 S.W.2d 53 (Tenn. 1992). With respect to whether Freeman conferred a direct benefit on the defendants, the trial court stated that it didn't "think [that issue has] been decided by Tennessee so I have to guess what the Supreme Court would do. And my guess is they would not find that there had to be direct contact." The trial court did not address the issue of whether Freeman had exhausted its remedies.

First, with respect to the choice of law issue, Tennessee has adopted the approach that "the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation." ***Hataway***, 830 S.W.2d at 59. The defendants argue that the alleged injury in the instant case occurred in New York, that no other state, especially Tennessee, has a more significant connection to the case, and that New York law should therefore apply. However, we agree with the trial court that the question of whether another state has "a more significant relationship to the litigation" is a question of fact, which, when disputed, as in the instant case, is inappropriate for summary judgment. Second, we agree with the trial court's conclusion that the Tennessee Supreme Court has never *required* that a plaintiff confer a direct benefit on a defendant before proceeding with its claim for unjust enrichment. Considering all of the above, we find no error in the trial court's denial of the defendants' motion for summary judgment on Freeman's unjust enrichment claim.

IV.

The judgment of the trial court, as modified, is affirmed. Freeman's individual claim based upon a theory of unjust enrichment is allowed to proceed in a manner consistent with this opinion. Exercising our discretion, we tax the costs on appeal one-half to the appellant, Freeman Industries LLC., and one-half to Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Daicel Chemical Industries, Ltd., and Nippon Gohsei Industries, Ltd.

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CHARLES D. SUSANO, JR., JUDGE